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ABSTRACT

The issue of whether judicial orders restricting access to court proceedings should be subject to a procedural hearing, the standing of the media in such hearings, and the role of the media in the entire process are analyzed in this paper. The various sections of the paper deal with the following topics: the procedural plan, proposed to the American Bar Association (ABA) by the Reporters Committee for Freedom of the Press, that would provide the media with the opportunity to be heard prior to the issuance of a restrictive order; the guidelines under consideration by the United States Senate that would limit the issuance of restrictive orders by federal courts; a procedural plan approved by the ABA that would provide due process before standing guidelines or special orders were issued by a court; the media response to the ABA recommendations; the trial judge's perspective on the issue; judicial interpretations of prior restraint orders; proposed changes to the 1968 ABA Standards; the possible decline in the issuance of restrictive orders; and the implications of the "Sheppard v. Maxwell" ruling dealing with pretrial publicity and trial fairness. (FL)

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PROTECTIVE/RESTRICTIVE ORDERS AND JUDICIAL REVIEW

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

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PROTECTIVE/RESTRICTIVE ORDERS AND JUDICIAL REVIEW

By Albert G. Pickerell

Discussion concerning the issuance and implemention of restrictive orders generally in the past has concentrated on the substance of the directive, with little attention paid to the procedure by which such orders were developed and promulgated. Many restrictive orders, in both state and federal courts, were entered without notice and without hearing. In some instances the orders were issued on the eve of trials or invoked orally during the trial. As a rule, no one appeared before the court to assert First Amendment rights.

In 1972, the Reporters Committee for Freedom of the Press announced as a "rather startling fact" that in no single case litigated by the media was an order upheld on its merits nor had there been any semblance of a procedural due process notice or hearing afforded to the public and the press in advance of the order being entered.[1]

Furthermore, it appeared that the numerous reports had failed to address the procedural problem. The Reporters Committee, in 1972 in the United States v. Dickinson,[2] raised the due process issue--believed to be the first time in any court.[3]

In 1974, in United States v. Schiavo, the need for due process in granting restrictive orders was recognized in the U.S. Court of Appeals for the 3rd circuit in a 7-2 holding that the press was entitled to some type of notice and hearing before entry of an order.[4] In subsequent cases the courts have been split. See infra at note 90.

Judicial orders restricting access to court proceedings, broadly speaking, take four forms: (1) orders restricting access to sources by silencing those sources;[5] (2) pretrial closure motions, e.g., to suppress evidence or hear venue motions;[6] (3) orders closing court proceedings, including orders sealing witness lists, grand jury transcripts, jurors' names, etc.;[7] and (4) prior restraint ('gag') orders directly proscribing the press from publishing material in its possession.[8]

There are many facets involved in the issuance of the various form. This study centers on whether such orders should be subject to a procedural hearing, the "standing" of the media in any such hearing, and an analysis of the media's position in respect to participation in the process.

Procedural plan proposed. A procedural plan to avoid or resolve controversies arising out of judicial restrictive orders was first unveiled in a panel discussion program at the August 1974 annual meeting of the American Bar Association in Honolulu. Proposed by Jack C. Landau on behalf of the Reporters' Committee for Freedom of the Press, the new concept involved advance notice to the media and opportunity to be heard prior to the issuance of a restrictive order.[9]

Landau, in making his proposal, observed that the infirmity of many such orders was compounded by the fact that they were imposed without any notice or opportunity for a hearing on the part of those directly affected--members of the news media.

"In this sense," he commented, "the situation of newsmen is unique: no other class of persons directly affected by court orders is repeatedly subjected to judicial decrees substantially limiting their rights without notice or any procedure for hearing and an appeal."[10]

Landau maintained that much of the "hostility, acrimony, and litigation' involved in challenging the substance of restrictive orders would be avoided if

an established procedure were followed.[11]

During the Honolulu meeting, participants in a seminar, who numbered an estimated 150, were given printed ballots and asked to respond to six questions related to proposals under consideration. The ballotting reflected an overwhelming majority (almost 7 to 1) in favor of the ABA proposing a model procedure for courts to follow before entry of restrictive orders. By more than 6 to 1, those voting favored giving news media hearing before the court. Eighty ballots were returned (47 judges, 22 lawyers, six laymen, and five news media personnel): 69 favored an ABA model procedure; 64 preferred a hearing for news media before an order was issued, and 64 favored the two-tier standing guidelines/special order approach outlined at the meeting.[12]

Encouraged by this response the ABA Advisory Committee developed a Preliminary Draft which was widely circulated among members of the bench, bar and press. The Committee conducted an opinion survey which compiled responses from 231 members of the judiciary, 173 attorneys, and 114 press representatives. An overwhelming majority (70 per cent) of those responding supported the procedure outlined in the Preliminary Draft.[13]

After delaying final action pending the Nebraska litigation in the U.S. Supreme Court the ABA House of Delegates in August, 1976, concluding more than two years' consideration, adopted a set of recommended procedures.[14]

Prior to a voice vote, the Advisory Committee expressed the view that the Nebraska case, decided a few weeks earlier, "neither moots the need for the procedure recommended nor indicates that the recommendations should be modified."[15]

Federal guidelines proposed. On the federal level, a Senate subcommittee report issued in October, 1976 called for guidelines limiting issuance of restrictive orders by federal courts and the closure of judicial proceedings.[16] The study took the view that Nebraska Press Association increased the necessity

of resolving the free press/fair trial dilemma in that the Supreme Court did not confront the issue of closed proceedings nor did it address the problems raised by issuances of restrictive orders on trial participants.[17]

The subcommittee would prohibit restrictive orders on trial participants unless the extrajudicial statements would constitute a "serious and imminent threat to the fair administration of justice." A proposed three-prong test would require that the judge find cause to believe the prejudicial material would reach jurors or probable jurors, would create an impermissible level of prejudice, and that alternative safeguards against predjudicial publicity would not suffice.[18]

The subcommittee recommendations would mandate that before a judge could issue a restrictive order, seal any document or close any proceedings (whether at the pretrial level or during the trial itself) a hearing must be held in which the press would be accorded standing to litigate the propriety of such an order.[19]

On the issue of "standing for the press" the subcommittee report comments:

> Not only do restrictive orders supress the speech of trial participants, they also infringe upon the freedom of the press by cutting off news at the source. Perceiving this threat to the press, some courts have accorded the press standing to contest the issuance of restrictive orders upon trial participants. Most courts, however, have failed to do this. Judges argue that since the press is not a party to the trial, since it is not directly restrained by restrictive orders, and since injury to it is not "concrete", standing is not justified. The subcommittee disagrees. We propose that where restrictive orders are issued upon trial participants, the press, along with those upon whom the orders fall, should be accorded standing to litigate the validity of the restriction. To deny standing to the press is, in our view, to sanction restraint upon a vital first amendment interest without the appropriate procedural safeguard.
>
> The subcommittee considered extending standing to the public as well as to the press. While such standing could entail problems, it is a matter which probably should be investigated further when the legislation is introduced.[20]

ABA Procedures. The guidelines approved by the ABA in August, 1976, embody two forms of procedure: (1) adoption of standing guidelines, which would be continually in force and generally apply to all criminal proceedings. They would establish normal standards of conduct for disclosure of information and would not be enforceable by contempt citations. The standing guidelines would address the areas covered by the Reardon report. (2) Adoption of special orders, which would be reserved for specific cases in which it was found that "potential prejudicial publicity posed such a substantial threat to a fair trial as to justify use of the court's contempt power, within the boundaries of constitutional and other substantive standards applicable in the jurisdiction." Special orders would be tailored to the particular circumstances of the case. Violations would be enforceable by contempt.[21]

The reasoning behind this two-fold approach is that standing orders of general application are largely ignored in cases of little public interest, whereas when a sensational trial occurs there is general confusion as to whether the standing order will be enforced and what parts of such order apply to the particular case. This approach is based on the concept that, with a special order tailored to specific circumstances, this potential area of misunderstanding and conflict would be eliminated. In the meantime, standing guidelines would serve to establish the normal standards of conduct.[22]

The adopted procedures recommend that a judge: (1) give notice to the public and press when access-restricting orders are being considered; (2) permit written objections be filed by a specified date; (3) if objections are filed, hold an informal or evidentiary hearing at which interested persons may appear with or without counsel and without conceding personal jurisdiction of the court; and (4) provide for appellate review, forthwith, in the most expeditious manner provided by the particular jurisdiction for review of temporary injunctive

orders or any other orders subject to expedited review.[23]

The recommended procedures, the report stressed, were not intended "to recommend or encourage the use of judicial restrictive orders." Primary purpose was to provide due process before standing guidelines or special orders were issued by a court. Only under "extraordinary circumstances" would a court enter restrictive orders and then only temporarily unless due process protection had been afforded the media and other interested parties.

To provide for media imput in the decision-making process and to insure "full cognizance" of First Amendment requirements the ABA's standing procedure contains a number of relevant proposals: (1) the distribution of theproposed standing guidelines to state and local news media; (2) the opportunity to respond in writing by a specified date; (3) a court-scheduled meeting between judges and "interested persons" for discussion of the proposed guidelines; (4) publication of guidelines as finally proposed by the court after such hearing with a further opportunity for written objections; (5) a hearing afforded to air any such objections, and (6) the final adoption of the standing guidelines.[24]

Media response and reaction. The ABA, following circulation of the Preliminary Draft, held special hearings in which media representatives participated. Several modifications were made to the original draft, including adoption of recommendations against issuance of any order that would impose direct restraint on the media and that the test for entry of a restrictive order should be "applicable constitutional standards," rather that "reasonable likelihood."

Despite these changes, a considerable wave of negative media reaction developed. Principal objection was that it "institutionalized" an essentially unconstitutional procedure.[25] Commented a spokesman for the American Society of Newspaper Editors:

"The press would not want to be in a position of tacitly accepting a court finding which it thought unconstitutional, just because press representatives had negotiated ground rules or attended procedural discussion."[26] "The press," he said, "is not going to mousetrap itself into accepting automatic conviction."[27]

James C. Goodale, vice president and general counsel for the New York Times, in an appearance before the ABA Advisory Committee commented: "The constitutional guarantees of a free press are not served merely by taking away those guarantees through a procedure which is fair. Some guarantees of the free press cannot be taken away, regardless of the procedure."[28]

Although the revised procedures specifically recommended against issuance of direct prior restraints on the press, spokesmen for the media argued (and the advisory committee agreed) that there still existed the possibility that direct restraint might be imposed.[29]

ABA recommendations debated. The ABA proposals, newspaper attorneys argued, would in the wake of the Nebraska case, tend to encourage the use of restrictive orders. Floyd Abrams, a member of the ABA Standing Committee on Communications who has often represented the New York Times and who appeared before the ABA committee on behalf of NBC, said the procedures would lead to "more confusion, more litigation and more gag orders."[30] Conversely, the then chairman of the ABA Advisory Committee, Paul H. Roney, a federal circuit judge, argued the new procedures would discourage the issuance of restrictive orders. The ABA resolution could, he maintained, be a "sunshine law for the courts."[31] The committee attempted to meet the "proliferation" fears by stressing that it did not intend to recommend or encourage the use of restrictive orders and that it regarded as preferable the alternatives suggested in the Reardon report and by the U.S. Supreme Court in Sheppard.[32]

Judge Roney commented that the committee's proposed procedural framework "offers a fair, pragmatic and much-needed means of minimizing the impact caused by the inevitable constitutional collision of two precious rights. The procedure can be refined in the crucible of everyday experience in the courtrooms across the country."[33] But Judge Harold R. Medina expressed disapproval of the ABA procedures, issuing a rallying cry to the press "to fight like tigers every inch of the way." He urged the media to make no compromises and no concessions of any kind.[34] He told a newspaper publishers convention (to a standing ovation) that he had made a "great mistake" in 1967 in supporting voluntary guidelines: "The courts get ahold of these guidelines and the first thing you know it is rolled out into a piece of concrete as hard as a rock, and there is nothing voluntary about it and there are no exceptions to it and you are stuck."[35]

Opponents of the proposal saw participation by the media in such hearings as having other negative connotations, citing the fact that the source for news about pending court cases is often the very individual(s) that restrictive orders seek to bar from talking to the press. Their view is that if the press, in effect, participates in drafting a restrictive order--even by suggesting to the court that no order should be entered--it is questionable whether the press can avoid being directly bound by the order. Abrams puts the problem thusly: "Would not an appearance by the press with respect to the entry of a Special Order be taken by the courts as at least a kind of promise to abide by the order as if it were bound be it?"[36] Reasoning further along these lines, some newspaper attorneys who earlier favored press participation in a hearing on issuance of a restrictive order have modified their position and now express strong reservations. They might participate in such a procedure if they felt they would have any real influence, they explain, but believe that too often the judge would be holding a "window dressing," pro forma hearing to discuss the

contents and reasons for an order be had made up his mind to issue.[37]

One authority argues that so long as prior restraints are possible, depending on the circumstances, it follows that short-term restraining orders can be issued whenever a plausible claim of special circumstances can be made.[38] Concern also has been expressed that some trial judges might issue prior restraint orders together with findings that the Sheppard alternatives are inadequate.[39] A hint of such approach is found in a California trial judge's report that the list of Sheppard "palliatives" was treated with "amazement, anger, or laughter" by trial judges attending sessions of the National College of the State Judiciary.[40]

The essential purpose of the ABA procedure, Judge Roney has explained, is to assist a judge who is confronted with a fair trial-free press situation in two ways: (1) to permit the judge to explore the various measures that may be taken to assure a fair trial, and (2) to provide a full amplification of the First amendment ramifications of any action that would effectively restrict the flow of information to the public.[41] Judge Roney saw the procedure as encouraging judges to deal with problems in the fair trial-free press areas as far in advance as possible, thus minimizing "those last-minute decisions that have to be made in an emotionally charged atmosphere. . . ."[42]

A recent experimental variation of the ABA recommendations was adopted by a California Superior Court judge in appointing a three-member committee to advise him concerning sealing of a grand jury transcript in a multiple-murder case.[43] The committee, appointed at the request of attorneys for The Fresno Bee, consisted of representatives of the press, the public, and the legal profession. Judge Kenneth Andreen instructed the committee to evaluate the requested protective order in accordance with a "reasonable likelihood" standard. He emphasized he would not necessarily be bound by its findings:

> It is probable that no procedure can be adopted for all cases and all circumstances. It may be that the court will ultimately adopt procedures quite different from those chosen today. The attempt made here is by one judge in a single case. It is obvious to him that the press and the courts face a period of experimentation and dialogue before procedures can be refined.[46]

The Advisory Committee recommended--and Judge Andreen concurred--that only ten lines of the 350-page grand jury transcript be sealed.[45] A defendant's petition for writ of prohibition was denied by the court of appeals on the ground that the issue was moot. The appellate court stated, however, that it was not passing "on the validity of the respondent's order appointing a citizen committee to be given access to a sealed grand jury transcript and to exercise part of the judicial function; this order should not be construed to sanction such a procedure."[46]

In April 1977, the Board of Governors of the State Bar of California accepted recommendations of its Committee to Confer with the Media, and rejected the ABA proposals and at the same time reaffirmed support of that state's Joint Declaration, which it had adopted in 1970.[47] The committee earlier had concluded that approval of the ABA procedures "would undo much of the constructive work that had been accomplished by the Joint Declaration."[48]

Trial judge's perspective. Restrictive orders contribute to the prospect of a trial judge facing the ordeal of incarcerating a newsman who probably is acting in good faith. The trial judge can anticipate that his order will be subject to rigorous appellate review and that highly competent counsel will promptly file petitions and briefs in support of the newsman.[49] The judge may be faced with a situation for which the "weaponry of judicial power [contempt] is ill-designed."[50]

The determination whether to issue a restrictive order must take many uncertain factors into consideration. If a trial judge fails to grant a

requested order he runs the risk of spending weeks or months trying a case that may be doomed to be reversed, should it result in a conviction.

Where, on the eve of a trial involving sensational multiple murders, the court is informed that there are prospects of publication of an alleged confession or prior criminal record which will make a fair trial "impossible," the problem facing the trial judge has been described as follows by a California court:

> Usually judges are faced with the question whether to issue a protective order at a very early stage in a criminal prosecution. Many of the factors which militate in favor of such an order can only be dimly perceived. The judge may, of course, have a vague idea about the case's potential as a trigger for prejudicial news. He probably knows something about the seriousness of the crime, the character, prominence or notoriety of the principals, and can guess at the newsworthiness of the proceedings from whatever publicity has already been engendered. That, however, is about it.[51]

Judicial interpretations. In the Nebraska Press Association case the U.S. Supreme Court in 1977 struck down a controversial prior restraint order but left unresolved the issues relating to orders not restraining publications. The Court stopped short of ruling out all prior restraint orders but said nothing about orders restraining attorneys and law enforcement officials.[52]

Legal authority for such orders has been regarded as stemming from the inherent contempt powers of the judiciary and from language in the Sheppard case. However, exception has been taken to this view. For example, in testimony on the revision of ABA FT/FP standards the American Society of Newspaper Editors took the position that such prohibitions were "totally and absolutely improper." "We see no legal or constitutional validity," it stated, "for any ABA standards being applicable to law enforcement officers or police on covering up what should be public records."[53]

Largely because of inability to reach agreement on proper First amendment criteria, courts in recent years in issuing restrictive orders have used a number of varying standards. Depending on which court decisions one relies there are at least three sharply differing standards in current use by courts

in analyzing the protective/restrictive order issue: (1) reasonable liklihood;[54] (2) serious and imminent threat;[55] and (3) clear and present danger.[56]

The weight of judicial authority has been that an order imposing restraint upon the press[57] or on the defendant[58] requires a clear and present danger test, while restrictions on individuals connected with a trial requires only a showing of reasonable likelihood of prejudcing a fair trial.[59] In such cases, courts have held that definite minimum procedures must be employed for issuance of a prior restraint order against the media. In the first instance, the petitioning party has the burden of establishing, in an adversary setting at which the public must be represented and afforded an opportunity to be heard, a strong factual basis for the issuance of an order.[60]

In response, the trial court should make specific factual findings which lead it to conclude that the order is necessary under the unique circumstances of the case. The court should consider all alternatives to the exceptional remedy of a restraining order and exhibit the reasons for its conclusion that each is inadequate.[61] Review by appellate courts will be limited to whether the petitioner sustained the burden of justifying issuance of the order.[62]

The ABA in establishing its minimum standards in 1968 adopted a "reasonable likelihood" test for extrajudicial statements by attorneys. In the commentary to that edition there was cursory discussion of possible First amendment implications but the ultimate conclusion was that the standard posed no significant constitutional problem.[63]

Such standard has not been universally accepted by the courts. Several have upheld restrictive orders under the reasonable likelihood test,[64] while others have adopted a more rigorous First amendment standard. In these latter decisions, particularly Chicago Council of Lawyers v. Bauer, the courts have challenged the reasonable likelihood standards as overly restrictive of First amendment rights of attorneys and have assigned greater weight to the public

interest in being fully informed about the administration of criminal justice. The court in Chicago Council of Lawyers preferred "serious and imminent threat" over "clear and present danger." An ABA Advisory Committee of FT/FP, under chairmanship of Judge Alfred T. Goodwin of the U.S. Court of Appeals for the Ninth circuit, has recommended extensive modifications to the Reardon standards, to be considered by the ABA House of Delegates in August, 1978. The Goodwin committee regarded serious and imminent threat as substantially indistinguishable from clear and present danger and adopted the latter.[65]

On the issue of whether hearings are required prior to issuance of a restrictive order and the media's standing if a hearing is conducted, courts again have taken differing positions. For example, a South Carolina court held (in connection with an order restricting extrajudicial statements by trial participants and sealing names of prospective jurors) that neither the news media nor the public had a right to prior notice or opportunity to be heard before issuance of such an order.[66] In handing down the order the judge did not give the media notice before the order went into effect and did not offer any factual evidence that news coverage of the trial would deprive the defendant of the right to an impartial jury.[67]

In appealing the case to the U.S. Supreme Court, news organizations urged the justices to review the case on the ground that orders restricting trial participants from talking to the press were merely subterfuges in order to evade the Court's decision in Nebraska Press Association. It was argued that courts should not be permitted to issue restrictive orders unless the judge had given the public and press notice of the order and an opportunity to appear in court and contest the directive. Such type of due process, it was maintained, was required by the Supreme Court in obscenity and other free-speech cases.

In a brief submitted to the Supreme Court the Justice Department supported the lower court's order, claiming that the press had no "direct interest" in orders depriving the press of the ability to gather information from trial participants. The brief made a distinction between a restrictive order and a prior restraint such as that struck down in Nebraska.[68]

The Supreme Court, in January, 1978, declined to review the case.[69] Central to the question of standing is whether the plaintiff can show an injury "likely to be redressed by a favorable decision;"[70] and has alleged a sufficient "personal stake in the outcome of the controversy."[71]

In a number of cases standing has been denied on the basis that the media's rights are neither more nor less that the public at large.[72]

On the other hand, a number of courts have ruled that the press, even though not a party to litigation, has standing to question the validity of a restrictive order because its ability to gather news is directly impaired or curtailed. A leading case holding such position is CBS v. Young, in which a federal judge in Ohio issued an order applying to trial participants in civil suits against the state, university officials, and members of the national guard arising out of confrontations between demonstrating students at Kent State and the national guard. The order sought to restrain all attorneys, court personnel, all participants in the litigation, whether plaintiffs or defendants, their relatives, close friends and associates "from discussing in any manner whatsoever these cases with members of the news media or the public."[73]

In a per curiam opinion, the U.S. Court of Appeals for the Sixth Circuit held that to justify such an order the activity must pose a clear and imminent threat to a protected competing interest and that the restriction is constitutionally impermissible if reasonable alternatives are availiable.[74]

On the issue of standing, the court, noting that the "protected right to publish the news would be of little value in the absence of sources from which to otain it," held that the media had "standing to maintain the present action and to challenge the validity of the restrictive order entered by the district court."[75]

There have recently been a number of similar judicial rulings. For example:

---In the area of pretrial proceedings, the Arkansas Supreme Court held that a trial court erred in excluding the press and the public from voir dire examination and that the news media had standing to challenge such an order.[76]

---The Supreme Court of Iowa ruled that a trial judge's order in a murder trial restraining disclosure of juror's identities was an unwarranted restriction in that the jury list was a public record to which the media were entitled acess. Alternatives such as sequestration, the court said, had not been adequately considered. The trial court recognized the media's standing and newspaper attorneys appeared in a hearing prior to issuance of the order.[77]

---A Florida trial court during a kidnapping case issued without notice or hearing an order prohibiting extrajudicial statements by witnesses, court officials or lawyers. An appeals court directed the trial judge, prior to commencement of the trial, to conduct a hearing at which all interested parties, including the media, could present arguments concerning the restrictive order.[78]

---In Minnesota, two trial courts had issued orders impounding complaints in murder cases and sealing files pertaining to the prosecution until final disposition of the proceedings. The State Supreme Court held that newspapers had standing to challenge the orders, inasmuch as the orders had the effect of either directly or indirectly interfering with the newspapers' functions of collecting or disseminating news.[79] The court further held that there was

insufficient evidence that would "constitute a clear and substantial showing so as to justify the prohibition against public accessibility."[80]

---A trial judge's order closing pretrial suppression hearings to news media was annulled since the judge failed to consider any facts that might have shown "unusual circumstances" or threat to the "integrity of trial."[81]

The problem of the exclusion of the press from pretrial hearings "to blunt the impact of prejudicial publicity" was not decided in Nebraska Press Association and in this area there have been contradictory and confusing lower court decisions.

A prominent relevant case is Gannett Co. v. DePasquale,[82] in which the U.S. Supreme Court May 1, 1978, granted certiorari.[83] The Supreme Court decision presumably will provide guidelines on the standards a judge must follow and the circumstances he must find before issuing a pretrial exclusionary order.

In the widely publicized "Wayne Clapp murder case" (former local policeman), pretrial evidentiary hearings were closed; the case then went to the appellate division, which ruled in favor of the press, saying such closed hearing was nothing more than a substitute for a prior restraint on publication of news.[84]

This decision was appealed to New York's highest court (the Court of Appeals) which reversed the intermediate court and upheld the closure order. The court held 4-2 that "criminal trials are presumptively open to the public, including the press," but that this was a pretrial proceeding, not a trial, and therefore the judge had more discretion to seal the hearings.[85]

On the issue of media standing, the Court of Appeals held that at the trial level interested members of the news media should be provided and opportunity to be heard, "not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest.[86] The court held that if was not a "legitimate" public interest but one of curiosity "with respect to a notorious local happening."[87]

The American Newspaper Association filed an amicus suriae brief in support of the petition for certiorari stating:

> ". . . The New York Court of Appeals has held that a hearing judge, having been presented with no evidence as to the potentially predjudicial effect of the public release of information, however derived, of the extent of past publicity and base his ruling thereon. Even more incredible, the hearing judge is invested with authority 'to distinguish mere curiosity from legitimate public interest' and, whenever he determines that the public's interest results from anything less than 'overwhelming' legitimate public interest, close the proceedings to the public and the press. Such perversion of judicial process, coupled with the total disregard of First Amendment guarantees, is clearly contrary to law and decisions of the court."[88]

The New York court, the ANPA stated, had established a precedent which, if permitted to stand, "will inevitalbly interjuct judges at all levels into censorship roles that are simply inappropriate and impermissible under the First amendment" as the Supreme Court declared in Nebraska Press Association.[89]

The Reporters Committee for Freedom of the Press joined ANPA in its brief.

The New Yorks courts position in DePasquale was held "unacceptable" by the U.S. Court of Appeals for the Third circuit in a Pennsylvania case involving State Senator Henry J. Cianfrani, a political protege of Philadelphia Mayor Frank Rizzo.[90]

The federal appellate court, in reversing an order closing the trial evidentiary hearing and sealing the transcript, held that the Sixth amendment right to a public trial extended to pretrial hearings and that a Pennsylvania trial court must give full and fair consideration to the important public interest served by open judicial proceedings.[91]

Noting that the due process clause of the Fifth amendment and the "public trial" provision of the Sixth together express a policy which "strongly favors the presumption that all adjudicative proceedings are open to the public,"

the court ruled that the Sixth amendment's requirement of a public trial "is not designed to benefit the accused exclusively."

"Non-parties who nevertheless have a stake in the litigation need an opportunity," the court stated, "to observe the course of the trial or read accounts of it in the press." The suppression hearing had "the characteristics of a testimonial hearing, which is the essence of a trial proceeding," within the meaning of the Sixth amendment.[93]

ABA procedures. The ABA FT/FP Standards adopted in 1968 apply a test of "substantial likelihood of interference." Recommended changes to these standards, as proposed by an ABA Advisory Committee and to be considered by the ABA House of Delegates in August, 1978, represent a significant departure from the original standard. Under the proposed changes, before pretrial proceedings can be closed or any record sealed a two-part test must be met. The moving party must establish that (1) "a clear and present danger to the fairness of the trial" would exist if the information were publicly disclosed and (2) the "prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means."[93] The proposed standard requires that any motion to close a pretrial proceeding or seal court records be made with the consent of the defendant. The motion, however, cannot be granted unless the court affirmatively concludes that the requirements of the two-part test have been met.[94]

(Closure of the courtroom with the defendant's consent during a pretrial proceeding has been recommended by various guidelines and required by some statutes.)[95]

The proposed revisions relating to extrajudicial statements by attorneys (sec. 8-1.1 to 8-1.3) would, when adopted, be incompatible with the procedural guidelines adopted by the ABA House of Delegates in August, 1976. (See discussion at supra note 21.)

Adoption of the new standard is seen as resolving the difficulty faced by an attorney concerning the precise nature of any professional responsibility to refrain from making extrajudicial statements. The new standard would authorize sanction for speech outside the confines of the courtroom but limit those sanctions to circumstances in which the attorney's public statements are so prejudicial that a fair trial becomes a practical impossibility. Thus, the recognition of rule-making authority under this standard falls far short of a roving commission to punish extrajudicial statements that are displeasing or offensive to the court.[96]

Instead of adopting standing rules concerning extrajudicial statements, many courts as discussed above, have dealt with this problem by fashioning silence orders on a case-by-case basis. Typically, these orders applied to attorneys and court personnel, but frequently also included parties, witnesses, and law enforcement officials.[97] The content of these orders ordinarily followed the same general line as given in the original Reardon report. Their effect is to establish per se restrictions on speech, and for that reason are incompatible with the approach taken in the second edition.[98]

If the revisions to the FT/FP standards recommended by the Goodwin committee are approved, presumably the ABA due process procedures adopted in 1976 would ultimately be modified to conform. However, the new standards would seem to make the procedural requirements less likely to be needed or to be imposed.

Earlier drafts of the second edition included due process procedural requirements but these were dropped out in the final draft on the theory they more properly belonged in other chapters of the overall standards relating to the administration of criminal justice.

Decline in orders? Both the defense and prosecution now seem to believe that open discussion may not be as harmful as was formerely believed.[99] The U.S. Supreme Court in Murphy v. Florida held that extensive publicity and knowledge of the case by sitting jurors was not fatal to a conviction,[100] and the California Court of Appeal, in confirming the Manson conviction, ruled that the fact a case had received enormous publicity did not by itself establish error.[101] Angela Davis, Maurice Stans, John Mitchell, John Connally, Sonny Carson and other celebrated defendants were acquitted in the face of widespread publicity.

Restrictive orders, a California jurist has speculated, "may be headed for the same fate that befell the dinosaurs at the onset of the ice age."[102] Whereas there was once what is described as a "gag order fad,"[103] the rarity of current publicity orders is described by another California judge as "striking."[104] Any "proliferation" of restrictive/protective orders in California appears to have ceased.

The resolution of the House of Delegates of the California State Bar condeming the jailing of the Fresno four[105] was seen as evidence of the disfavor with which protective orders are held. Queried a California trial judge: "If the lawyers of this state won't stand behind enforcing a court order, then can it be long before a judge will have to do much soul searching before issuing such an order?"[106]

"Current chaos?" Sheppard v. Maxwell in 1966 and its progeny combined with the Reardon standards of 1968 and voluntary codes in various states brought an abundance of confusion in respect to pretrail publicity and trial fairness. Earlier this year the U.S. Supreme Court left standing trial court orders in South Carolina[107] and Ohio[108]---inaction that, in the language of the Reporters' Committee "continues the current chaos" among lower federal and state courts on restrictive/protective order issues.[109]

The Ohio order prohibited the defendant in a kidnapping case from telling the press his side of a hostage-taking incident. In the South Carolina case, a restrictive order prohibited all participants in a trial from "mingling with" the press in the courthouse.[110] These cases involved trial proceedings rather than a pretrial motion such as that invoked in the DePasquale case, in which the U.S. Supreme Court has granted certiorari.[111]

The Reporters' Committee expressed concern that if the Supreme Court upholds the New York court "judges all over the nation will routinely start closing pretrial proceedings and court records as a way to restrict press reporting of criminal trials."[112]

Because various courts have reached widely differing conclusions in respect to protective/restrictive orders, a situation has resulted "where no one in the press, the bar, or the bench really knows what the law is."[113]

E.g., the Supreme Court of Minnesota, noting the "potential recurring nature" of such problems, recently requested the state's Advisory Committee on Rules of Criminal Procedure to throughly study the issue and, if it deems appropriate, propose a rule which would "in exceptional cases and consistent with judicial authority, set forth the procedures for obtaining and implementing a restrictive order, the necessary guidelines and findings required of the district court and the method of review by this court."[114]

Although the case in which the U.S. Supreme Court granted certiorari involves pretrial as distinguished from trial proceedings, conceivably the high court's decision, expected next term, will provide some clarification on these issues. An extremely narrow decision would permit continued confusion and uncertainty.

REFERENCES

[1] Landau, "Fair Trial and Free Press: A Due Process Proposal," 62 A.B.A.J. 55 (1976).

Literature on free press/fair trial issues has been voluminious. See, e.g., bibliographical entries in 1 Emerson, Haber and Dorsen, Political and Civil Rights in the United States, 474-476, 503-509 (4th ed., 1976). For current developments see The News Media and the Law (Reporters Committee for Freedom of the Press), issued six times a year. For discussion particularly on procedural aspects of restrictive orders see, e.g., Note, "Ungagging the Press: Expedited Relief from Prior Restraints on News Coverage of Criminal Proceedings," 65 Georgetown L.J. 81 (1976); Note, "Protective Orders Against the Press and the Inherent Powers of the Courts," 87 Yale L.R. 342 (1977); Rendlesman, "Free Press-Fair Trial: Review of Silence Orders," 52 North Carolina L. Rev. 127 (1972); Warren and Abell, "Free Press-Fair Trial: The 'Gag' Order, a California Aberration," 45 So. Cal. L.R. 51 (1972); Symposium, Nebraska Press Association v. Stuart, 29 Stanford L. Rev. 383-626 (1977), esp. Barnett, "The Puzzle of Prior Restraint," pp. 539-560; Note, "Gag Order Protection for Civil Trials," 64 Georgetown L.J. 967 (1976); Note "Gag Orders on Criminal Defendants," 27 Hastings L.J. 1369 (1976); Stonecipher and Trager, "Judicial 'Gag' Orders: An Unresolved Dilemma," paper presented at convention of Associat[illegible]or Education in Journalism, Madison Wisc., 1977.

[2] 465 F. 2d 496 (5th Cir. 1972), 476 F. 2d 373 (5th Cir. 1973), cert. denied, 414 U.S. 979 (1973).

[3] Supra note 1 at 59.

[4] 504 F. 2d 1 (3d. Cir. 1974), cert. denied, 419 U.S. 1096 (1975).

[5] Hirschkop v. Virginia State Bar, 421 F. Supp. 1137 (1976); People v. Dupree, 388 N.Y.S. 2d 203 (1976); State ex rel Angel v. Woodahl, 555 P. 2d 501 (Mont., 1976).

[6] U.S. v. Cianfrani, 573 F. 2d 835 (3d Cir. 1978); Hearst Corp. v. Cholakis, 386 N.Y.S. 2d 892 (1976); Gannett Co. v. Mark, 387 N.Y.S. 2d 336 (1976).

[7] U.S. v. Gurney, 558 F. 2d 1202 (5th Cir. 1977), petition for cert. filed sub nom Miami Herald Publishing Co. v. Krentzman, cert. denied 98 S. Ct. 1606 (1978); Commercial Printing Co. v. Lee, 553 S.W. 2d 270 (Ark. 1977); In re Disclosure of Grand Jury Report, 3 Media L. Rptr. 1161 (Fla 1977); Gannett v. Burke, 2 Media L. Rptr 1224, hearing denied, 2 Media L Rptr. 1551 (2d Cir. 1977).

[8] State ex rel Beacon Journal v. Kainrad, 348 N.E. 2d 695 (Ohio, 1976); Florida ex rel Miami Herald v. McIntosh, 340 So. 2d 904 (1977); Sun Co. v. Superior Court, 105 Cal. Rptr. 873 (1973); Younger v. Smith, 106 Cal. Rptr. 225 (1973).

[9] ABA Legal Advisory Committee on Fair Trial and Free Press, Fair Trial/Free Press: Voluntary Agreements (1974) at 58.

[10] Id. at 60.

[11] Id.

[12] Id. at 59.

[13] ABA Legal Advisory Committee on Fair Trial and Free Press, Recommended Court Procedures to Accommidate Rights of Fair Trial and Free Press (August 1976) p. 4-5. Hereinafter cited as ABA Court Procedures.

[14] Id. See also "Fair Trial-Free Press Resolutions Adopted," 62 A.B.A.J. 1280 (1976); "A.B.A. Urges Curb on Gag Procedures," New York Times, Aug. 11, 1976 at 46.

[15] ABA Court Procedures (Appendix,) p. 12.

[16] Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, 94th Cgs., 2nd session, "Free Press-Fair Trial" (Committee Print, 1976).

[17] Id. at 111.

[18] Id. at 8.

[19] Id. at 11.

[20] Id. at 11-12.

[21] ABA Court Procedures at 5.

[22] Id.

[23] Id.

[24] Comparison of Preliminary Draft of July, 1975, and Final Draft of August, 1976. See also American Bar Association Press Release No. 120276 at 3-4 (Dec. 2, 1976).

[25] E.g., A.M. Rosenthal, managing editor of the New York Times, took the position the press had no business legitimizing judicial censorshop by negotiating with a judge on a restrictive order. He saw such participation as an "ethical waiver" that was worse than having to deal with orders issued without consultation. See Seib, "What Limit on Press Freedom?" The Guardian (Manchester) Nov. 9, 1975, p. 18. Also see Goodale, 'Prior Restraint, Fair Trial-Free Press," Communications Law 25 (Practicing Law Institute, 1975); Gillmor, "Free Press and Fair Trial; The Volcano Erupts," Current History, July-Aug. 1976, at 19.

[26] Hornby, "An Imaginative Trial Balloon for 'Gag' Orders," Bulletin of American Society of Newspaper Editors, Oct. 1974, at 16.

[27] Id. at 39.

[28] Editor & Publisher, Nov. 1, 1975 at 12.

[29] Consoli,"Iawyers Vote Approval of Gag Order Procedure," Editor & Publisher, Aug. 14, 1976 at 9.

[30] N.Y. Times, Aug. 11, 1976 at 46. See also, Press Censorship Newsletter (Reporters Committee for Freedom of Press) Sept.-Oct. 1976 at 35.

[31] Judge Roney described the proposed procedures as a compromise between two poles--the judge who says 'nobody is going to tell me how to run my courthouse' . . and persons in the media who take the position there is absolutey no kind of order that a court can ever enter that will have any effect on the news media acess. . ." 1975 APME Redbook at 38-39.

[32] ABA Court Procedures at 7.

[33] Roney, "The Bar Answers the Challenge," 62 A.B.A.J. 60, 63 (1976). For speculation that the ABA procedures would reduce the "current glut" of restrictive orders, see Commentary, "Applying Due Process to Gag Rules and Orders," 55 Nebraska L. Rev. 427 (1976).

[34] Medina, "The Press Should 'Fight Like Tigers,' a Judge's View," Bulletin of American Society of Newspaper Editors, Jan., 1973, at 6.

[35] "Judge Medina Cheered by Publishers at ANPA," Editor & Publisher, May 9, 1976 at 82.

[36] Undated statement submitted to ABA Legal Advisory Committee on Fair Trial and Free Press, mimeographed copy in author's files.

[37] As reported in an interview with Robert S. Warren, Los Angeles attorney who has frequently represented the Los Angeles Times (Feb. 9, 1977).

[38] Schmidt, "Nebraska Press Association: An Expansion of Freedom and Contraction of Theory," 29 Stanford L. Rev. 431, 469 (1977); see also, Schmidt, "The Nebraska Decision," Columbia Journalism Review, Nov.-Dec. 1976 at 51, 53.

[39] Schmidt, 29 Stanford L. Rev. at 470.

[40] Younger, "The Sheppard Mandate Today: A Trial Judge's Perspective," 56 Nebraska L. Rev. 1, 8 (1977); see also Younger, "Some Thoughts on the Defense of Publicity Cases," 29 Stanford L. Rev. 591 (1977). The inadequacy of the Sheppard "devices" is also discussed in Isaacson, "Fair Trial and Free Press: An Opportunity for Coexistence," 29 Stanford L. Rev. 561-67 (1977).

[41] Roney, supra note 33 at 62.

[42] Id. A "hot line" procedure developed by the California Judges Association seeks to achieve the same objective through a different approach. Recognizing that when a criminal case generating massive publicity occurs there is little time to do adequate research, the Public Information Committee of the Association offers a new service on an informal basis. A judge asked to issue a restrictive or prior restraint order is able todiscuss the matter with a judge who has been through the some situation. Fretz, "Try the HOTLINE!" Calif. Courts Comentary (March, 1975) at 2.

[43] People v. Garcia, No. 29261 (Superior Court of Fresno County, Oct 31, 1975).

[44] Id. at 4

[45] Id. at 3.

[46] Garcia v. Superior Court, No. 2788 (5th Div. Court of Appeals, Nov. 13, 1975).

[47] The Recorder (San Francisco), April 15, 1977, at 1. See also, Department of Communications and Public Affairs, State Bar of California News Release, April 15, 1977.

[48] Letter to Board of Governors of California State Bar from J. Hart Clinton, Chairman of the State Bar Commitee to Confer with the Media, Nov. 18, 1975.

[49] Eight amicus briefs were filed in the "Fresno Four" case, representing the views of virtually every major news organization in the country.

[50] Younger, supra note 40 at 5.

[51] 30 Cal App. 3d at 159-160, 101 Cal. Rptr. at 239.

[52] 96 S. Ct. 2791, n. 8 at 2805, n. 21 at 2820.

[53] 46 L.W. 2100 (Aug. 23, 1977).

[54] People v. Dupree, 386 N.Y.S. 2d 203 (1976); Younger v. Smith, 106 Cal. Rptr. 225 (1973); Society of Professional Journalists v. Martin, 431 F. Supp. 1182, affirmed with qualifications, 556 F. 2d 706 (4th Cir. 1977); Hirschkop v. Virginia State Bar, 421 F. Supp 1137 (1976).

[55] Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); see also, In re Oliver, in which a New York court held that if press exclusionary orders during the actual trial could ever be justified, they "could stand only upon a clear showing. . . that it was necessary to meet 'a serious and imminent threat' to 'the integrity of the trial,'" and concluded that since no such showing had been made the exclusionary order was unwarranted. In re Oliver v. Postel, 331 NYS. 2d 407, 413 (1972).

[56] CBS v. Young, 522 F. 2d 234 (6th Cir. 1975); State ex rel Woodahl, 555 P. 2d 501 (Mont. 1976).

[57] American Bar Association, Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press (second edition, tentative draft, summer 1978) at 2-3. Hereinafter cited as ABA FT/FP Standards. See also Younger v. Smith, 106 Cal. Rptr. 225 (1973).

[58] Hamilton v. Municipal Court, 76 Cal. Rptr. 168 (1969).

[59] E.g.., People v. Dupree, 386 N.Y. 2d 203 (1976).

[60] U.S. v. Schiavo, 504 F. 2d 1 (3d Cir. 1974), cert, denied, 419 U.S. 1096 (1975); Florida ex rel Miami Herald v. McIntosh, 340 So. 2d 904 (1977).

[61] Nebraska Press Association v. Stuart, 427 U.S. 539, 562 (1976).

[62] Northwest Publications v. Anderson, 259 N.W. 2d 254, 257 (1977); State ex rel Beacon Journal v. Kainrad, 348 N.E. 2d 695 (1976). In McIntosh, the Florida Supreme Court in 1977, in ruling on the propriety of orders issued in a securities fraud case, stated:

> "Although freedom of the press belongs to all the people those who gather and distribute news have special concerns which entitle them to notice and a hearing before any trial court enjoins or limits publication of court proceedings. The circumstances may require a summary hearing byt reasonable notice under prevailing conditions and a hearing must be had in each instance. The court should serve notice to news reporters present, but no order entered in good faith is invalid for lack of notice to one or more who may be unavailable to receive notice. Announcement from the bench or publication in writing in the courtroom should be adequate." 310 So. 2d at 910.

[63] ABA FT/FP Standards (1968 edition) at 93.

[64] Supra note 54.

[65] The ABA Advisory Committee cited the Chicago Council of Lawyers opinion, along with scholarly commentary, as being highly influential in prompting its recommended change. ABA FT/FP Standards at 1.

[66] Society of Professional Journalists v. Martin, 556 F. 2d 706, 707 (1977).

[67] Id.

[68] The News Media and the Law (Reporters Committee, April, 1978) at 3.

[69] 98 S. Ct. 749 (1978). Mr. Justice White and Mr. Justice Powell would grant certiorari.

[70] Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976).

[71] Baker v. Carr, 369 U.S. 186, 204 (1962).

[72] E.g., United Press Associations v. Valente, 123 N.E. 2d 777 (1954).

[73] CBS v. Young, 522 F. 2d 234, 236 (1975).

[74] Id. at 239.

[75] Id. at 238.

[76] Commercial Printing Co. v. Lee, 543 S.W. 2d 270 (1977).

[77] Des Moines Register v. Osmundson, 248 N.E. 2d 493 (1976). Proposed revisions to the ABA FT/FP Standards provide (sec. 8-3.6(b)) that as an alternative to sequestration in cases where there is significant threat of juror intimidation, the court may withold juors' names and addresses as long as that information is not otherwise required by law to be a matter of public record.

78 ABA FT/FP Standards at 23. The committee report comments: "The trial court, in fashioning an order of this type, should couch it in terms of refusal to disclose rather than a general ban on publication of juror names and addresses. The general ban would be a prior restraint, since it would prevent publication of this information even if the news media acquired it from alternative sources." Id. at 25

79 Northwest Publications v. Anderson, 259 N.W. 2d at 256.

80 Id. at 258.

81 In Matter of Hearst Corp. v. Cholakis, 386 N.Y.S. 2d 892 (1976). Judge Cholakis made findings that unusual circumstances existed and that adequate alternative remedies were not availiable; he, thereupon, excluded the public and press from the suppression hearings. This decision was not challenged by the Hearst Corporation.

82 Cannett Co. v. DePasquale, 398 N.Y.S. 2d 719 (1976), judgement modified 372 N.E. 2d 544 (1977).

83 98 S. Ct. 1875 (1978).

84 389 N.Y.S. 2d 719.

85 372 N.E. 2d at 550.

86 Id.

87 Id.

88 General Bulletin, American Newspaper Publishers Association, (No. 21, April 19, 1977) at 76-77.

89 Id.

90 U.S. v. Ciafrani, 573 F. 2d 835 (1978).

91 Id. at 854.

92 Id. at 850.

93 ABA FT/FP Standards at 16.

94 Id.

95 An A.L.R. study of 1970 reported six states with statutes authorizing the magistrate to exclude certain persons from the preliminary examination or hearing (Montana, North Dakota, Utah, Idaho, Nevada and California). In two states (Arizona and New York) the magistrate has been held to have inherent power to make such exclusion. California Penal Code sec. 868 makes it mandatory, upon the request of the defendant, that the preliminary examination be closed to the press and public. The California Supreme Court has ruled that the magistrate had so discretion in respect to the defendant's request. People v. Elliott, 54 Cal. 2d 498 (1960). See "Right of Person Accused of Crime to Exclude Public from Preliminary Hearing or Examination," 31 A.L.R. 3d 816 (1970).

[96] ABA FT/FP Standards at 5.

[97] Id.

[98] Id. at 6.

[99] Prof. Kaplan, on the basis of experience as a trial lawyer and "amateur student of jury behavior," has concluded that "newspaper publicity, or any other assertions of facts of a case made outside of court, have virtually no impact upon the jury trying the case. . . the jurors almost invariably assumed as a matter important to their status that they know more about the facts of the case than any newspaper reporter and that their superior understanding was due to their close observation of the trial itself," Kaplan, "Of Babies and Bathwater," 29 Stanford L.R. 621, 623 (1977).

Charles Garry, a prominent criminal trial lawyer, has observed: "The experiences of defense attorneys in much publicized cases have convinced us that the putative conflict between the first and sixth amendments is a myth." Garry maintains that greater use of voir dire, increased peremptory challenges combined with objective standards for challenge for cause would do much to remedy the prejudicial publicity problem. "Ironically," he comments, ". . . there are certain circumstances under which massive publicity, even if prejudicial in content, can be of real benefit to a defendant charged with a sensational crime." Carry and Riordan, "Gag Orders: Cui Bono?" 29 Stanford L.R. 575, 582-586 (1977). See also Hanscom, "Gag Orders Facing Extinction?" Calif. Courts Commentary, (January, 1977) at 4.

[100] 421 U.S. 794, 803 (1975).

[101] 132 Cal. Rptr. 265, 314-17; cert. denied 98 S. Ct 1582 (1978).

[102] Supra note 99.

[103] Younger, supra note 40 at 5.

[104] Id. at 2. Los Angeles County with some 350 trial judges of municipal, superior and federal district courts, has been seen as producing far more than its proportional share of publicity cases. However, according to Judge Younger, there were no more than five such cases during 1976. Each trial judge has about one chance in 70 of handling a "publicity case" in a given year. Thus the average judge will never handle such a case. Id.

[105] Rosato v. Superior Court, 124 Cal. Rptr. 427 (1976).

[106] Supra note 99.

[107] Central South Carolina chapter, Society of Professional Journalists v. Martin, 556 F. 2d 706 (4th Cir. 1977), stay denied, 97 S. Ct. 2629 (1977), cert. denied 98 S. Ct. 749 (1978).

[108] Ohio ex rel Leach v. Sawacki, cert. denied 98 S. Ct. 729 (1978).

[109] The New Media and the Law (Reporters Committee, April 1978) at 16.

[110] Supra note 108.

[111] 98 S. Ct. 1875 (1978).

[112] Supra note 109 at 4.

[113] The News Media and the Law (Reporters Committee, July, 1978) at 16.

[114] Northwest Publications v. Anderson, 259 S.W. 2d at 257.